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American States Insurance Company v. Deborah Turney : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

AMERICAN STATES INSURANCE COMPANY, an Indiana Corp., Plaintiff/Respondent, vs. DEBORAH TURNEY, Defendant/Appellant.	Case No: 970010-CA Priority No. 15

BRIEF OF THE APPELLANT

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR UINTAH COUNTY, STATE OF UTAH
HONORABLE JOHN R. ANDERSON PRESIDING

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I.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are identified in the caption. Appellant, Deborah Turney, was the defendant below. Respondent, American States Insurance Company ("American States"), an Indiana Corporation, was the plaintiff. Although not named as a party defendant by American States, John Turney, defendant's husband, is an owner of the insurance policy which is the subject of this declaratory judgment action.

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STATEMENT OF JURISDICTION

This appeal is from a final judgment entered in favor of the plaintiff on cross-motions for summary judgment in a declaratory judgment action, under § 78-33-1, U.C.A., by the Eighth Judicial District Court, Uintah County, the Honorable John R. Anderson presiding. Jurisdiction in this Court is proper pursuant to § 78-2a-3(j), U.C.A.

V.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

1. Whether or not the court below erred in denying defendant's cross-motion for summary judgment by: a) failing to construe the insurance policy in question as designating John Turney, as an individual and as a named insured, thereby providing underinsured motorist coverage to John Turney's family members; and, b) failing to hold, that the undisputed evidence established that Joseph Price was a "family member" of John Turney within the meaning of that term under the insurance policy in question (preserved for review at R. 0145-0181)?

2. Whether or not the court below erred in entering judgment for American States, on the premise that the insurance policy in question unambiguously insured only a partnership and not John Turney as an individual, thereby excluding underinsured motorist

coverage for John Turney's family members (preserved for review at R. 0169-0181)?

Because this appeal is from the grant of plaintiff's motion for summary judgment and the denial of defendant's cross motion, all issues are reviewed as a matter of law for correctness. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

VI.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

This appeal involves no determinative constitutional provision, statute, ordinance, rule or regulation.

VII.

STATEMENT OF THE CASE

A. Nature and Course of Proceedings Below.

Plaintiff American States filed this declaratory judgment action seeking a ruling, that Joseph Price was not covered by the underinsured motorist provision of an insurance policy issued to his stepfather, John Turney (R. 0053-55). The action was filed against Price's mother, defendant Deborah Turney, after she submitted a claim under the policy for Price's death in a vehicular accident. After some discovery was conducted, both parties moved for summary judgment, the primary issue being the construction of certain policy provisions (R. 0140-42; 0145-46). Those provisions provide underinsured motorist coverage for the "family members" of the named insured (R. 0094).

Plaintiff's motion, which was filed April 10, 1996, asserted that the only named insured under the policy was Split Mountain Construction, a partnership consisting of Vent Slaugh and John Turney (R. 0140). Plaintiff asserted that, because a partnership has no family members, Price was not covered by the underinsured motorist provisions. Plaintiff argued, in the alternative, that even if coverage did extend to Turney's "family members," Price did not meet the policy criteria because he did not reside full-time with his mother and stepfather. Plaintiff's only evidence of Price's residence was an unsupported allegation, that John Turney had said that Price lived "wherever" (R. 0183).

Defendant's cross-motion and opposing memorandum were filed on May 9, 1996 (R. 0145). She asserted that Turney, as an individual, was a named insured under the policy, which designates "Vent Slaugh and John Turney d/b/a Split Mountain Construction" as the "Named Insured" (R. 0070). Thus, the policy's underinsured motorist provisions, which cover the "family members" of named insureds, would include Price, Turney's stepson. Deborah Turney submitted an affidavit stating that Price met the definition of "family member" because he resided at her (and John Turney's) home (R. 0185).[1]

Oral argument was heard on September 18, 1996, before the Honorable John R. Anderson. The court below adopted plaintiff's construction, and held that the policy unambiguously insured only a partnership, and not the individuals. Thus, the court found it unnecessary to decide whether or not Price met the definition of "family member." The court rested its ruling upon the premise that a partnership is recognized as a legal entity, which is separate from the partners comprising it (9/18/96 Tr., pp. 14-16).

The court entered its order granting final judgment in favor of plaintiff on October 3, 1996 (R. 0203-5). Defendant's timely notice of appeal was filed on November 1, 1996 (R. 0206). By order dated November 26, 1996, the appeal was transferred to the Utah

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[1]Plaintiff's reply brief, which was filed on May 22, 1996, asserts that this affidavit was unsigned. A signed copy of the affidavit was served on plaintiff on May 24, 1996, about four months before the hearing on the motions was held in September of 1996 (R. 0185).

Supreme Court (R. 0208). On January 3, 1997, it was returned to this Court (R. 0228).

B. Facts Relevant to Appeal.

Defendant's decedent, Joseph Price, was fatally injured in an automobile accident on or about December 17, 1994 (R. 0140). At the time of the accident, Price was a passenger in a vehicle owned and operated by David Gurr. Id. Neither Gurr nor his vehicle have any connection with Price's stepfather, John Turney, or his business. Id. Price was not an employee of Turney's business. Id.

After settling with Gurr for his policy limit of $25,000, Deborah Turney made a claim with American States under the under-insured motorist provisions of the policy in question, which was obtained by her husband, John, from American States. Deborah and John Turney were married in 1981, when Price was seven years old. He was twenty at the time of his death.

The policy was first issued on or about June 29, 1994. It lists the "Named Insured" as "Vent Slaugh and John Turney d/b/a Split Mountain Construction" (R. 0070). At the time it was issued, the policy listed only one covered vehicle, a 1977 Kenworth tractor. Between June and December 1994, five additional vehicles were added -- all of them street vehicles.[2] The commercial

[2]Defendant's counsel noted, at oral argument, that one of these vehicles was co-owned by Joseph Price, although it does not appear that any evidence was submitted on this point.

liability coverage designation lists "partnership" as the form of business (R. 0071).

The underinsured motorist provision of the policy designates "insureds" as:

> 1. You.
> 2. If you are an individual, any "family member."
> 3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto." The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss or destruction.
> 4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."

(R. 0094).

The policy provides:

> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and to any other person or organization qualifying as a Named Insured under this policy.

R. 0075).

Thus, the "family members" of a named insured are covered by the underinsured motorist protection. The underinsured motorist provision defines "family member" as "a person related to you by blood, marriage or adoption which is a resident of your household including a ward or foster child" (R. 0095).

Defendant maintains that John Turney, as an individual, was a named insured, and that Price was, therefore, covered by the underinsured motorist provisions as a family member of John Turney.

VIII.

SUMMARY OF ARGUMENT

(A)

THE COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. The Policy Must be Interpreted as Including John Turney as a Named Insured.

The policy in question provides underinsured motorist coverage to the "family members" of the named insureds. Because John Turney, the individual, is listed by name in the designation, he is a named insured and his family members are covered by the under-insured motorist provisions.

Construing the policy from the perspective of a reasonable insured, listing Turney's name in the Named Insured designation is a clear indication that he is a named insured. See, United States Fidelity & Guaranty v. Sandt, 854 P.2d 519, 523-25 (Utah 1993); Christiansen v. Holiday Rent-A-Car, 845 P.2d 1316, 1318 (Utah App. 1992) (identity of parties listed in designation is the best indication of who is named insured). Adding the phrase "d/b/a Slpit Mountain Construction," after the individuals' names does not remove them as named insureds because "d/b/a" is merely descriptive of the parties originally identified. See, Carlson v. Doekson Gross, Inc., 373 N.W.2d 902, 905 (N.D. 1985) (under policy using "d/b/a" designation, the individual was named insured).

Even if defendant's interpretation is not clear, plaintiff's view that only Split Mountain was a named insured is not clear

either. This ambiguity, which results from alternative plausible constructions, must be resolved against the plaintiff, the insurer, and in favor of coverage. See Sandt, 845 P.2d at 523-25.

2. The Court Erred in Adopting Plaintiff's Construction.

Acknowledging that a partnership is a separate entity for some purposes does not preclude designating individual partners as named insureds. See Hartford Accident and Indemnity Co. v. Huddleston, 514 S.W.2d 676, 678 (Ky. App. 1974); Weber v. Snyderville West, 800 P.2d 316, 318 (Utah App. 1990). The issue remains one of construing the language of the documents involved in the transaction. See Weber, 800 P.2d at 318. Here, that language refers to John Turney as well as to Split Mountain.

Moreover, the policy in question does not limit or exclude who is a named insured based upon form of business. Underinsured motorist coverage depends, expressly, upon who is a named insured without regard to form of business. Thus, it was error to rely upon form of business (i.e., partnership) to limit this coverage. Indeed, had that been intended, plaintiff could have easily stated as much in clearer terms.

The cases relied upon by plaintiff were not on point. All plaintiff's cases acknowledge the significance of listing partners by name instead of just the partnership. See Burnsed v. Florida Farm Bur. Cas. Ins., 549 So.2d 793 (Fla. App. 1989).

It was clear error to rely upon the insurer's subjective expectations as a ground for limiting coverage. See Allen v. Prudential Property and Casualty Ins. Co., 839 P.2d 798 (Utah 1992).

3. Price was a Family Member.

Under the policy, whether or not Price was a family member depends upon his residence. Defendant submitted an affidavit sufficient to establish Price's residence as qualifying under the policy. Plaintiff submitted no contrary evidence. Thus, defendant is entitled to judgment on this point. See Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994).

(B)

ALTERNATIVELY, THE JUDGMENT FOR PLAINTIFF MUST BE REVERSED AND THE CASE REMANDED

The mere filing of cross-motions for summary judgment does not compel a court to grant one or the other. See Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53, 55 (Utah 1981). Here, regardless of whether or not defendant proved her interpretation to be correct, plaintiff failed to meet its burden in that regard. The judgment for defendant must be vacated, although the court may remand to consider extrinsic evidence instead of directing that a judgment be entered for defendant.

IX.

ARGUMENT

(A)

THE COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. The Policy Must Be Interpreted as Including John Turney, the Individual, as a Named Insured.

The core issue here is very simple--is John Turney a named insured under the policy in question? If he is a named insured, he comes within the term "you" in the policy's underinsured motorist provisions and his "family members" are covered. In this regard the defendant, Ms. Turney, need only show that her husband is one of several named insureds, whereas plaintiff must show that the partnership was the only named insured.

Defendant's construction rests upon the plain, ordinary meaning of the terms chosen by American States to designate the "Named Insured." See United States Fidelity & Guaranty Co. v. Sandt, 854 P.2d 519, 523 (Utah 1993) (policy terms should be accorded their plain, ordinary meaning); see also, Loya v. State Farm Mutual Ins. Co., 888 P.2d 447, 451 (N.M. 1994) (insurer may not alter the "generally understood meaning" of a "common word" by inserting a "unique definition" in the policy). A reasonable layperson would certainly interpret the designation "Vent Slaugh and John Turney d/b/a Split Mountain Construction" to include, as named insureds, Slaugh and Turney, as well as Split Mountain. See

Sandt, 854 P.2d at 524. This is because they are identified by name in the designation.

It is generally accepted, that the identity of a policy's named insureds is determined by who is listed by name. See Christiansen v. Holiday Rent-A-Car, 845 P.2d 1316, 1318 (Utah App. 1992); see also, Mutual of Enumclaw Ins. Co. v. Roberts, 912 P.2d 119, 122-23 (Idaho 1996) (party listed as named insured had that status, notwithstanding exclusions); Mid-Century Ins. Co. v. Liljestrand, 620 P.2d 1064, 1067 (Colo. 1980). Listing the name "John Turney" under the "Named Insured" designation is a fairly clear indication that he is intended to enjoy that status--even if other names are also listed. Appending the phrase "d/b/a Split Mountain Construction" to Slaugh and Turney does not obviate the fact that they are individually listed.

Moreover, the designation "d/b/a . . . is merely descriptive . . . [and] does not create an entity distinct from the person operating the business." Southern Insurance Co. v. Consumer Insurance Agency, Inc., 442 F.Supp. 30, 31-32 (E.D. La. 1977); (quoting Duval v. Midwest Auto City, Inc., 425 F.Supp. 1381, 1387 (D. Neb. 1977)). It is axiomatic that using a "d/b/a" designation does not relieve the named individuals from personal liability. Id. It has also been held, that the use of such a designation in a business insurance policy refers to the individual and not to a separate entity. See Carlson v. Doekson Gross, Inc., 373 N.W.2d 902, 905 (N.D. 1985). Accord, O'Hanlan v. Hartford Accident and

Indemnity Co., 639 F.2d 1019 (3rd Cir. 1981). The fact that these cases involved sole proprietorships is irrelevant. The point is that the term "d/b/a" does not, by itself, create a distinct entity or, more fundamentally, eviscerate the effect of listing an individual by name. See Anderson v. Gardner, 647 P.2d 3 (Utah 1982). In this regard, one might wonder how plaintiff would interpret this designation, if the issue was Turney's personal liability for past due premiums.

Even if the designation chosen does not clearly include Turney, the individual, as a named insured, it does not clearly exclude him either. It is, at a minimum, ambiguous because a reasonable insured could plausibly read it as designating Turney as a named uninsured. See Sandt, 854 P.2d at 524-25 (policy is ambiguous, if there is a plausible alternative construction, notwithstanding the fact that the construction might be obvious to professionals). Moreover, the fact that "the construction urged by the insurer appears to be more reasonable" does not obviate the ambiguity, where there is a plausible alternative interpretation. Grain Dealers Mut. Ins. v. McKee, 911 S.W.2d 775, 780 (Tex. App. 1995); see also, Government Employees Insurance Co. v. Dennis, 645 P.2d 672, 675 (Utah 1982) (insurer which "uses a 'slippery' [term] to mark out and designate those who are insured" can blame only itself if coverage proves broader than anticipated). The existence of such an ambiguity should have compelled the court below to

accept the construction urged by Ms. Turney, the insured. See Sandt, 854 P.2d at 522.

2. The Court Below Relied upon Irrelevant and Improper Considerations in Adopting Plaintiff's Construction.

Plaintiff's burden, here, was to establish that its policy clearly and unequivocally designated Split Mountain--and only Split Mountain--as the named insured. It persuaded the court below by relying upon a partnership's status as a separate, legal entity and by referring to other policy provisions which should have little or no bearing upon this matter. Plaintiff was aided in this endeavor by relying upon a number of cases, the applicability of which is rather marginal. Finally, plaintiff succeeded in having the trial court focus upon some improper (and exaggerated) public policy concerns.

American States placed primary reliance upon the status of a partnership as a recognized separate entity, which is distinct from its partners. Its argument seems to be that, because Split Mountain is an entity, not merely a trade name, its very existence precludes the possibility of dealing with the partners as individuals. There are two fundamental flaws in this reasoning. First, the premise is overstated, in that partnerships are not completely separate entities for any and all purposes. Second, there is no logical or legal reason why the separate existence of a partnership--even if it was complete--should supplant the

existence of the individuals and, thereby, preclude naming them as named insureds along with the partnership.

The cases, which plaintiff cited below regarding the separate existence of partnerships, without exception, stand for the proposition that a partnership may sue or be sued in its own name. E.g., Cottonwood Mall Co. v. Sine, 767 P.2d 499 (Utah 1988); Wall Investment Co. v. Garden Gate Distributors, Inc., 593 P.2d 542 (Utah 1979).

Unlike a corporation, which has a completely separate existence, partnerships are not entirely distinct from their partners. See McCune & McCune v. Mountain Bell Telephone, 758 P.2d 914, 917 (Utah 1988) (ultimately, partners may be personally liable for partnership debts); see also, Hartford Accident and Indemnity Co. v. Huddleston, 514 S.W.2d 676, 678 (Ky. App. 1974) ("although [UPA] regards the partnership as a legal entity for many purposes, these purposes are, nevertheless, limited"). Whereas corporate existence establishes "a wall" between third-parties and the corporation's principals, partnership existence is more analogous to "a door"--it is certainly real, but hardly absolute or insur-mountable.

Indeed, in Huddleston, a case very similar to the one at bar, the Kentucky court held, that the family members of the partners did have uninsured motorist coverage under a policy listing only the partnership as a named insured. 514 S.W.2d at 678. The court expressly rejected the argument, that the separate existence of the

partnership was, by itself, sufficient to preclude such a construction of the policy.

Unlike Huddleston, Ms. Turney is not asking the courts to look behind a designation, which names only "Split Mountain." Here, John Turney is listed by name. Huddleston is significant because it rejects the very proposition that the plaintiffs seek: the seperateness of naming a partnership precludes the individual partners as being "named insureds" under a business policy.

More fundamentally, the issue is not the capacity of a partnership to function as a separate entity, but the intent of the transaction in question. See Weber v. Snyderville West, 800 P.2d 316, 318 (Utah App. 1990). Thus, whether service upon a partner is effective as to the partnership turns upon "the import of the summons." Id. See also, Barber v. Emporium Partnership, 800 P.2d 795, 797 (Utah 1990) ("service must be directed to the defendant partnership"). Notwithstanding the unquestioned capacity of a partner to accept service for the partnership, a summons is effective only as to the individual unless it specifies the partnership. See Weber, 800 P.2d at 318; Barber, 800 P.2d at 797.

The same rules apply here. The fact, that Split Mountain is an entity with the capacity to be a named insured, does not mean that it must be so under the policy in question. It does not mean that it must be the only named insured. In short, the existence and capacity of a partnership is not exclusive as to the capacity of the partners. The issue remains one of construing policy

language and, as to that issue, partnership existence is only marginally relevant.

American States emphasized below, that the policy declaration identifies the form of business as "partnership." However, the interpretive path, which must be followed here, makes no reference to form of business. The underinsured motorist provisions provide that, "[i]f you are an individual," your family members are covered. The policy defines "you" as those shown in the declaration under "Named Insured." The name "John Turney" is listed. John Turney is an individual. Although both "John Turney" and "Split Mountain Construction" appear in the declaration, "Named Insured" and "Form of Business" are distinct categories in the policy. No policy provision limits or excludes who is a named insured based upon form of business. Specifically, American States' definition of the term "you" is not in any way limited or qualified by form of business.

Finally, the underinsured motorist provisions make no reference to form of business. They use the phrase "if you <u>are</u> an individual," not the phrase "if you are doing business as an individual" or the phrase "if the form of business is as an individual."

The fact, that the policy's general commercial liability provisions contain an arguably clearer distinction based upon forms of business, is beside the point. Construing the policy as a whole does not entail interpreting different language from different

provisions to mean the same thing. Indeed, it means quite the opposite--that the choice of different language suggests the intent to convey a different meaning. Thus, far from supporting American States' construction of the relevant policy provisions, the general commercial liability provisions demonstrate that it was perfectly capable of conditioning coverage upon the form of business, when it chose to do so.

Perhaps, the most telling analysis involves considering how easily the construction urged by American States could have been more clearly indicated. It could have designated the named insured as "Split Mountain Construction." It could have limited the named insured or the term "you" to the type of entity indicated in form of business. It could have stated, in its underinsured motorist provisions, that there was no "family member" coverage, unless the form of business was a sole proprietorship. It could have had different attachments describing underinsured motorist coverage for different forms of business, and made no reference to "family members" on the partnership form.

Indeed, a number of cases have held that referring to "family member" coverage in the uninsured motorist provisions of a business policy is confusing and ambiguous, where the insurer interprets the policy as providing no such coverage at all. See King v. Nationwide Insurance Co., 519 N.E.2d 1380 (Ohio 1988); Decker v. CNA Insurance Co., 585 N.E.2d 884 (Ohio App. 1990); Hawkeye-Security Ins. Co. v. Lambrecht & Sons, Inc., 852 P.2d 1317 (Colo.

App. 1993); Horne v. United States Fidelity & Guaranty Co., 791 P.2d 61 (N.M. 1990); Grain Dealers Mut., 911 S.W.2d 775; Ceci v. National Indemnity Co., 622 A.2d 545 (Conn. 1993); Hager v. American West Ins. Co., 732 F.Supp. 1072 (D. Mont. 1989). In all of these cases, the courts allowed family member coverage where the only named insured was a corporation--which, theoretically, should present the strongest case against such coverage. Some of these cases even hold that non-shareholder corporate employees are family members. See King, supra; Decker, supra; Horne, supra.

There are certainly cases reaching an opposite result in the corporate context, some of which plaintiff cited below. See Lundgren v. Vigilant Ins. Co., 391 N.W.2d 542 (Minn. 1986) (family member of shareholder not covered); Cutter v. Maine Bonding & Cas. Co., 579 A.2d 804 (N.H. 1990) (employee was not family member of corporation). These cases are not controlling because Ms. Turney is not arguing that shareholders are named insureds under a corporate policy or, that employees are family members of a corporation. She is not even arguing that individual partners should be treated as named insureds, where the policy identifies only the partnership.[3] In this regard, the most pertinent authority, cited by either partner below, was Burnsed v. Florida

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[3]She is certainly not making any argument dependant upon the extreme position that the family members of corporate employees are covered by a policy identifying the corporation as the named insured, which was the position rejected in Herebner v. MSI Ins., 506 N.W.2d 438 (Iowa 1993).

Farm Bur. Cas. Ins., 549 So.2d 793 (Fla. App. 1989). In that case, the court held that the family members of partners were not covered, where the policy listed only the partnership as the named insured. But see, Huddleston, 514 S.W.2d 676. The court, however, expressly distinguished that situation from cases in which the partners were also individually named in the policy. See Burnsed, 549 So.2d at 795. Thus, even under its own case, listing Mr. Turney as a named insured supports interpreting the policy as conferring that status upon him indivudually.

The other partnership case cited by plaintiff below (and the one upon which it most heavily relied) is completely inapposite. In Fidelity & Casualty Co. of N.Y. v. Swayzer, 583 S.W.2d 850 (Tex. App. 1979), the issue was whether or not a partnership policy covered an individual partner for derivative liabilities arising from the operations of a different partnership. Notwithstanding some dicta regarding who was the named insured, the policy expressly excluded coverage for liabilities arising in connection with other partnerships or business ventures. The case had nothing to do with underinsured motorist coverage. Significantly, in a more recent decision, Texas has extended underinsured coverage to the family member of a corporation's sole shareholder, under a policy listing the corporation as the named insured. See Grain Dealer's Mut., 911 S.W.2d 775.

The real error committed by the court below, was that it resolved this issue on the basis of policy considerations instead

of policy construction. It held, in essence, that accepting defendant's construction would expose insurers to extreme and unanticipated liabilities, particularly in the context of a partnership with many members. Such reasoning is improper, as a matter of law, and inaccurate, as a practical matter. It amounts to giving controlling effect to the insurer's subjective expectations as to the scope of coverage, without regard to the language of the policy.

A similar doctrine ("the reasonable expectations doctrine") was rejected in Allen v. Prudential Property and Casualty Insurance Co., 839 P.2d 798 (Utah 1992). Moreover, in that case, it was the insured, who sought to invoke the doctrine. Given the manner in which accepted maxims of construction favor insureds, it is clear error to accord to an insurer, what is deemed too extreme for an insured. See Sandt, 854 P.2d at 522-25. Moreover, the coverage here cannot be deemed unexpected, where American States chose to list the individual partners by name, as named insureds. The prospect of extreme liability is illusory, unless an insurer chooses to list the names of all partners in a large partnership. In that case, the coverage would still not be unexpected, and the insured would have only itself to blame. See Dennis, 645 P.2d at 675.

Thus, the bottom line remains the same here. American States chose to list Mr. Turney as a named insured. American States chose to use a coverage form which refers to family members. This is not

a case in which an insured is attempting to rewrite the terms of a policy or invoke a strained construction. Rather, that is what American States, the insurer, is attempting to do. In the final analysis, American States failed to show that Split Mountain was clearly, unequivocally and unambiguously the only named insured. Therefore, the court below erred in declining to adopt defendant's reasonable construction of the policy.

3. Joseph Price Was a "Family Member" of John Turney.

Defendant is entitled to judgment on the entire case because it is undisputed that Joseph Price meets the definition of "family member." The parties agreed that the critical last issue is whether or not Price resided with his mother and stepfather at the time of the accident. Defendant introduced an affidavit in support of her motion, which expressly declares that Joseph Price resided in the Turney household.[4] Such evidence, if unopposed, is sufficient to carry defendant's burden on this issue. See Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994) ("party opposing . . . properly supported motion [has] 'an affirmative duty to respond with affidavits or other materials'").

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[4]As noted, there was a question as to whether the affidavit was unsigned, when first filed and served. The affidavit contained in the record is signed and sworn (R. 0185). It bears a service date of May 24, 1996, indicating that it was provided after defendant's motion was first filed, but months before the September 1996 hearing.

Plaintiff maintains that this issue is disputed, but it offered no contrary evidence. See Thayne, 874 P.2d at 124 (party opposing summary judgment cannot merely deny facts, but must produce contravening evidence). The only minimally tangible basis which plaintiff provided for the proposition that Price lived elsewhere, is its asserting that John Turney said that Price lived "wherever." The record contains no sworn statement by John Turney as to where Price resided. It does not even contain hearsay testimony by someone who supposedly heard Turney's statement. There is not even an unsworn explanation as to when and where he made this alleged comment. See Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983) (merely asserting that a fact is in dispute does not preclude summary judgment).

The only evidence as to where Price lived is defendant's affidavit. Plaintiff had the opportunity to either offer contrary evidence or request discovery on the issue. It did neither. Accordingly, if this Court adopts defendant's construction of the policy, it should also enter judgment in defendant's favor.

(B)

SUMMARY JUDGMENT FOR PLAINTIFF WAS IMPROPER

Even if this Court decides that defendant has failed to establish the propriety of her construction of the policy as a matter of law, it should nevertheless vacate the judgment in favor of plaintiff and remand for further proceedings. The fact that

both parties have moved for summary judgment on cross-motions "does not mean that [a] case must be finally disposed of as a matter of law." Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53, 55 (Utah 1981); see also Diamond T Utah, Inc. v. Travelers Indemnity Co., 21 Utah 2d 124, 127, 441 P.2d 705 (1968) ("it is not true that once both parties move for summary judgment the court is bound to grant it to one side or another"). This Court must determine whether or not the record was sufficient to allow for construing the policy as a matter of law.

In this regard, the Court need not find that defendant's interpretation is correct in order to hold that plaintiff failed to establish the correctness of its construction. This Court may conclude that neither interpretation is clear, as a matter of law, and that extrinsic evidence of intent must be used to resolve the matter.

Here, as the insurer, plaintiff had the more difficult burden in establishing its construction. Even if the policy does not clearly designate Turney as a named insured, a reasonable lay person would not read it as unambiguously designating only Split Mountain. See Sandt, supra. Even if it is premature to resolve any ambiguity in favor of defendant, the insured, the policy is not sufficiently clear to allow a judgment for the insurer to stand.

X.

CONCLUSION

The court below clearly erred in concluding that Split Mountain was unambiguously the only named insured under the policy. At the very least, there is an ambiguity which compels reversal. In fact, however, by listing "John Turney" -- by name -- as a "Named Insured," American States unequivocally conferred that status upon him as an individual. He was a named insured along with Split Mountain. Because defendant's construction is correct as a matter of law and there is no dispute as to Price's residence (the only other relevant issue), defendant is entitled to judgment as a matter of law.

DATED this 16th day of April, 1997.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By: _____
ROBERT J. DEBRY

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLANT (American States v. Turney) was mailed, postage prepaid, this 16th day of April, 1997 to the following:

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8874.BRF

There is no addendum required in my brief.